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MARRIAGE AND PROPERTY REGIME OF SPOUSES UNDER KOSOVO CURRENT LAW AND DRAFT – CIVIL CODE

Summary: *The impact of marriage in the property rights of spouses has been recognised since Roman law and nowadays remains a principle well established under each European legal system. Under Kosovo law, marriage creates different legal consequences between spouses including for their property rights. The current property regime of spouses under the Law on Family establishes rules on individual ownership and joint ownership. However, it does not recognise the contract for the regulation of the property regime of spouses. This has created problems with regard to the separation of the property after the marriage ceases. Contrary to this, under Kosovo Draft Civil Code – Book 4 on Family, the property regime of the spouses has advanced including for the recognition of premarital and marital contracts. This paper discusses questions arising from the relationship between spouses that have an effect on property and are treated from a current law perspective and in line with the civil law codification that is occurring in Kosovo.*

Keywords: *Kosovo law, Civil Code, marriage, spouses, property regime, contract*

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1. INTRODUCTION

As is the case for other Balkan civil law countries, Kosovo does not have a civil code in place. Traditionally in these countries, the civil law relationships have been subject to special law regulations. Under Kosovo law, the civil law relationships are regulated by special laws such as: (i) Law on Property and Other Real Rights – known as LPORR; (ii) Law on Obligational Relationships – known as LOR; (iii) Law on Family – known as LOF; and (iv) Law on Inheritance – known as LOI.¹

The institution of marriage and family is recognised by Constitution and Kosovo² and is regulated further by the Kosovo Law on Family (referred to as: LOF).³ The Constitution provides these rules on marriage: (i) everyone enjoys the right to marry and the right to have a family; (ii) marriage and divorce are regulated by law and are based on the equality of spouses; (iii) family enjoys special protection by the state in a manner provided by law.⁴ The LOF Article 1 determines that this law regulates the following institutions: (i) engagement, (ii) marriage, (iii) relations between parents and children, (iv) adoption, (v) custody, (vi) protection of children without parental care, (vii) family property relations and special court procedures for disputes of family relations. For the purpose of this article, the points two (ii) and three (iii) will be directly treated.⁵ Additionally, other institutions will be indirectly mentioned in the cases of reflection on property regime of spouses.

The LOF defines marriage as a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family.⁶ From this regulation, several characteristics can be pointed out, such as the following: (i) existence of two persons of a different sex; (ii) the will of these two persons to live together; and (iii) the aim of the spouses to create family.⁷ At the same time, these are conditions for the existence of the marriage. *Inter alia*, the LOF provides other conditions for entering into the marriage: (i) existence of the age of majority; (ii) free will of the future spouses; (iii) nonexistence of marriage prohibitions and bans.⁸ To clarify, the age of the majority is acquired at 18

1 Law No. 03/L-154 on Property and Other Real Rights published in Official Gazette No. 57 of 4 August 2009; Law No. 04/L-077 on Obligational Relationships published in Official Gazette No. 16 of 19 June 2012; Law No. 2004/32 on Family published in Official Gazette No. 4 of 1 September 2006; Law No. 2004/26 on Inheritance published in Official Gazette No. 2005/7.

2 Constitution of Kosovo No. K-09042008 published in Official Gazette No. 09. 04. 2008 and which is in force since 15 June 2008.

3 Law No. 2004/32 on Family published in Official Gazette No. 4 of 1 September 2006 and Law No. 06/L-077 on Amending and Supplementing the Law on Family published in Official Gazette No. 3 of 17 January 2019.

4 Constitution of Kosovo, Article 37. For more see Čukalović, I.; në Hasani, E.; Čukalović, I. (Eds.), *Komentari i Kushtetutës së Kosovës*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Prishtinë, 2013, p. 129 *et seq.*

5 The marriage under private international law is not treated in this article.

6 LOF, Article 14 (1) determines: "Marriage is a legally registered community of two persons of different sexes, through which they freely decide to live together with the goal of creating a family. Men and women, without any limitation due to race, nationality or religion, have the right to marry and found a family as well as they are equal to marriage, during marriage and at its dissolution."

7 For more on the concept of marriage see Gashi, H., *Komentari i Ligjit për Familjen*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Prishtinë, 2012, p. 18 *et seq.*

8 For more related to the marriage conditions provided by law see LOF, Articles 14–24. For more information see also Gashi, H., *E Drejta Familjare dhe Trashëgimori*, në Bajrami *et al*, Hyrje në sistemin ligjor në Kosovë, Akademia e Drejtësisë së Kosovës, Prishtinë, 2019, pp. 204–205.

and 16 years respectively, and with the court's permission to conclude the marriage.⁹ Finally, it should be stated that Kosovo law provides equal treatment between spouses in all relations during marriage and in case of divorce without any discrimination. Both spouses enjoy the same rights when it comes to the parental issues of determining the same responsibilities.¹⁰

As mentioned above, the regulation of the rules of civil law is made by special laws. Such a form has created divergences and a lack of legal certainty. Consequently, the idea of bringing together all these laws from the field of civil law in one single legal document called civil code is introduced. Thus, Kosovo has started the process of civil law codification. Indeed, this process started in 2004 but ended without a result as a consequence of the lack of Kosovo's political and legal status.¹¹ Thus, draft laws that were drafted as the Books of CC, Book on Obligation, Book on Ownership and Other Real Rights, Book on Family and Book on Inheritance were separated and adopted as special laws which are currently enforced. After this, for several years there was no project for civil law codification. During 2014-2016, the project on civil codification began – phase 1, a project launched by European Commission in support of the Ministry of Justice of Kosovo.¹²

The second phase of CC started in 2017, with support from the European Commission project. After several group meetings and work drafts, in November 2019 a consolidated draft was published. The Ministry of Justice has sent the consolidated draft of KDCC to the Government for approval.¹³ Nevertheless, this draft has not been approved due to the fact that the Government was dismissed without any constitutional plan and the formation of new institutions is still in process due to political crises. It seems that the year 2020 will be crucial for the decision of putting the Kosovo Civil Code in place.¹⁴ The Kosovo Draft-Civil Code (hereafter referred to as: KDCC) has 1630 articles and is divided into 5 books (in Albanian: *libra*) as follows:

- Book 1 on General Part;
- Book 2 on Obligations;
- Book 3 on Property and Other Real Rights;
- Book 4 on Family; and
- Book 5 on Inheritance.¹⁵

9 The organisation and the level of the courts are regulated by the Law No. 06/L – 054 on the Courts published in Official Gazette No. 22 of 18 December 2018.

10 In this regard Kosovo has promulgated the Law No. 05/L-020 on Gender Equality published in Official Gazette No. 16 of 26 June 2015. In particular, see Article 1–6. Furthermore, of a special importance is the Law No. 05/L-021 on Protection Against Discrimination published in Official Gazette No. 16 of 26 June 2015. In particular, see Article 1–4 of this law. For more regarding gender equality see Gashi, H., *Commentary of the Law no. 05/L – 020 on Gender Quality*, Kosovo Agency for Gender Equality, Pristina, 2017.

11 Gashi, *op. cit.*, note 6, p. 25 *et seq.*

12 The Government of Kosovo in 2016 established the first state Committee for Civil Code. Later, Ministry of Justice issued different decisions for drafting Civil Code without any consistency of work. This form of work did not produce results. Consequently, The Ministry of Justice in 2018 established the last and final Committee. The Committee with support of EU Project for Kosovo Civil Code – phase 2 produced three drafts of Civil Code including final draft – consolidated draft to which is referred this article.

13 The promulgation of the Civil Code is included in the legislative agenda of the Government for the year 2020. The Kosovo Draft Civil Code is available in Albanian, Serbian and English in this link: <https://md.rksgov.net/desk/inc/media/89AFEE64-B2C2-4B74-B15C-CCE8C3EC76E7.pdf>. Accessed on 25 April 2020.

14 The promulgation of this project by the Kosovo Assembly is a process which is depended by politics. Thus, this aspect is not subject of this paper. Nevertheless, as a legal text it has started to be treated by legal doctrine.

15 For more see Gashi, H., *Pjesa e Përgjithshme e të Drejtës Civile – Parimet e Përgjithshme në Bajrami et al*, Hyrje në Sistemin Ligjor në Kosovë, Akademia e Drejtësisë së Kosovës, Prishtinë, 2019, p. 168 *et seq.*

By this division, the German *pandectian* Civil Code is followed contrary to Austrian and French systems.¹⁶ Regarding Book 4 on Family, it must be pointed out that some very positive legal improvements (solutions) are made. In other words, it has to be said that generally under the KDCC, the same rules remain in place for marriage as under the LOF. However, the KDCC has made a prominent reform regarding recognising the contract for the regulation of the property regime of spouses.

Under the current LOF, the property regime of spouses may consider separate property (in Albanian: *pasuri e veçantë*) or joint property (in Albanian: *pasuria e përbashkët*). Traditionally the rule has been followed that property acquired before the marriage is considered as separate contrary to property acquired during the marriage which is considered joint property. The current LOF does not recognise the contract for the regulation of the property regime of spouses. By contrast, it provides rules only for the administration and possession of the property of the spouses during the marriage. Under the LOF the possibility to conclude the pre-marriage and marriage contract is not provided. However, there is a lot of discussion surrounding the fact that since the LOF does not explicitly exclude the possibility of a contract, parties (spouses) may regulate the property regime with a contract as well. A further dilemma is created when we consider whether such a contract can be used (pre-marriage and marriage) based on the principle of party autonomy established well under law of obligations.¹⁷ Contrary to this situation, the KDCC clearly recognises the pre-marriage and marriage contract of spouses.¹⁸

Finally, to conclude this introduction, the KDCC (in line with the LOF) regulates solely the *classic* or *traditional* form of marriage between a man (in Albanian: *burr*) and woman (in Albanian: *grua*).¹⁹ It does not recognise a marriage between persons of the same sex or civil unions. This was a unanimous decision of the working group that made the draft of the civil code.²⁰ Nevertheless, the KDCC has opened the window for a special law²¹ which would regulate the marriage and cohabitation or civil union of spouses of the same sex. This solution is in line with the development of the most developed European legal systems.

16 For the structure of these most important civil law countries see Zweigert, Z.; Kötz, H., translated from the German by Tony Weir, *Introduction to Comparative Law*, Second Edition, Oxford University Press, New York, 1987, pp. 76–186; Zimmermann, R., *The Civil Law in European Codes* in Hector L. MacQueen, Antoni Vaquer, Santiago Espiau Espia (Eds.), *Regional Private Laws and Codification in Europe*, Cambridge University Press, New York, 2003, p. 18 *et seq.*

17 Law No. 04/L-077 on Obligational Relationships published in Official Gazette No. 16 of 19 June 2012. For the principle of party autonomy see Article 2 of this law which provides: "Participants in obligatory relationships, in accordance with binding provisions, public order and good custom, are free to regulate their relations according to their will. Participants may regulate their relations differently from what is provided by the present law, unless the provisions of the present law do not provide otherwise in the meaning and purpose of the law."

18 KDCC, Article 1170 (4).

19 KDCC, Article 1138 states: "Marriage is a legally registered union of two spouses of different sexes, through which they freely decide to live together as husband and wife. Marriage is continuous legally regulated live union of husband and wife. Marriage is concluded by given consent of husband and wife and their signature before the official (registrar) of civil status."

20 LOR, Article 2 determines the concept of the family as the following: "Family is a vital community of parents and their children and other persons of the kin. Family is the natural and fundamental nucleus of society and enjoys the right to protection." For more on the concept of family see, Aliu, A., *Komentari i Ligjit për Familjen*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Prishtinë, 2012, p. 51 *et seq.*

21 KDCC, Article 1138 (2) determines: "Other forms of civil unions are regulated with a specific law."

2. THE IMPACT OF MARRIAGE ON THE PROPERTY RIGHTS OF SPOUSES

Marriage has an effect on the property regime of spouses. As noted in the introduction, under the current LOF of Kosovo, spouses do not have the option to decide on the contractual property regime.²² Consequently, by the establishment of the marriage one of the following types of property is created: (i) separate property and (ii) joint property of spouses.²³ In particular, in Kosovo this is specified due to the fact that several dilemmas are present when considering the equal rights of the spouse – women in particular (in Albanian: *gruaja*) – concerning property during the marriage. This has been part of several reports and strategies.²⁴

2.1. SEPARATE PROPERTY

The LOF recognises the concept of separate property of spouses. Furthermore, separate property is considered as the following: (i) the property of the spouse acquired before the marriage; (ii) the property acquired during the marriage as a result of inheritance, donation or another legal means for the acquisition of ownership; (iii) the property belonging to the spouse based on the proportion of common property; (iv) the product of art, intellectual work or intellectual property is considered separate property of the spouse who has created it.²⁵ This property is separate from joint property and belongs only to the spouse who bought or won it during the marriage. However, it has to be mentioned that during the separation of the joint property under court procedure, it is difficult to identify separate property as a consequence of the fact that during a life in partnership, the two types of property (separate and joint) are mixed. Additionally, it is also a problem because traditionally in Kosovo the joint property of spouses are registered in the name of one spouse (usually the husband) or in the name of an older member of the family in the case of large families. Thus, the separation of types of properties and contributions of family members remain the main challenges during court cases and procedures.²⁶

One spouse is free and independent from another spouse with regard to the administration, possession and transfer of the separate ownership. In this context, the rules provided by the LPORR for the individual property find application. In particular, it should be noted that the transfer of ownership is followed by the causal system of transfer. For the transfer of movables,²⁷

²² The contractual property regime is subject of below treatment under KDCC.

²³ See LOF, Article 45.

²⁴ Minitria e Drejtësisë, *Strategjia Kombëtare për të Drejtat Pronësore në Kosovë*, Ministria e Drejtësisë, Prishtinë, 2016, p. 35; Organizata për Siguri dhe Bashkëpunim në Evropë – Misioni në Kosovë, *Gjykimi i rasteve familjare në Kosovë: Çështjet lidhur me menaxhimin e lëndëve*, Organizata për Siguri dhe Bashkëpunim në Evropë Misioni në Kosovë, Prishtinë, 2011, pp. 28–31.

²⁵ See LOF, Article 46.

²⁶ For instance, see decision of the Court of Appeal of Pristina no. Ac.nr.3235/14 of date 20. 05. 2014. In this case the court had to determine the contribution of the family member.

²⁷ LPORR defines the movable property as the following: "Movables are independent corporal objects that are not permanently attached to the ground or a part of the ground, and are generally capable of being moved. Physical objects that are not corporal, such as light or electricity, are intangible movables."

two conditions are required: (i) a valid legal transaction (contract or testament); and (ii) the delivery of the movable property.²⁸ With regard to the transfer of immovables²⁹ these conditions have to be met: (i) existence of a valid legal transaction; and (ii) registration of the legal transaction in the register for the immovable property that is kept by the cadastre.³⁰ With this approach, the LPORR is following the Austrian causal model on acquisition of ownership on movables and immovables contrary to the German abstract model and French consensual system.³¹

2.2. JOINT PROPERTY

According to LOF Article 47, the joint property is considered a property obtained from the moment of marriage until the end of the marriage and any income from such a property. Alongside joint property, the real rights, obligations and property acquired by gambling games are also considered.³² This property is treated as joint property in that both spouses are joint owners of this property. By law, the parts are equal even though the property is not separated. This property is different from co-ownership because in co-ownership the parts of the co-owners are known, such as 1/2, 1/3, or 20%, 30% etc., whereas in joint property the parts are not distinctly separated but rather both spouses are joint owners of all the property. Also, if immovable property (ownership) is registered in the name of only one spouse, the law states that it belongs to both spouses as joint ownership.³³ In the case of separation, it is considered that the parts should be divided equally. In the case of disagreements between spouses, the contribution of the joint owners is taken into consideration, where is worth mentioning that childcare, conduct of housework, and maintenance of property are included as a contribution to the joint property.³⁴

This form of separation of joint property has been subject to criticism from different stakeholders who claim that the female gender is discriminated against as they are not acquiring the proper property. Further, the family violence was present and because of this, the Law on Protection against Domestic Violence has been promulgated.³⁵ As mentioned above, the main challenges during court procedures for the evaluation of the contribution of the spouses is the lack of financial contribution. For instance, in one court case,³⁶ despite the fact that the women did

28 LPORR, Article 21. For more see Gashi, H., *Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law*, Hanse Law Review, Vol. 9, No. 1, Germany, 2013, pp. 46–54.

29 For the concept of immovables see LPORR, Article 10.

30 LPORR, Article 36.

31 For these systems see generally Van Vliet, L., *Transfer of Movables in German, French, English and Dutch law*, Ars Aequi Libri, Nijmegen, 2000, pp. 201–205; Van Vliet, L., *Transfer of Property Inter Vivos* in Michele Graziadei and Lionel Smith (Eds.) *Comparative Property Law – Global Perspectives*, Edward Elgar, UK and USA, 2017, pp. 150–168; Von Bar, C., Ulrich Drobnig, U., *The Interaction of Contract Law and Tort and Property Law in Europe – A Comparative Study*, Sellier. European Law Publishers, Munich, 2004, pp. 324–328.

32 For more see Aliu, A., *E Drejta Sendore*, Universiteti i Prishtinës, Prishtinë, 2014, p. 121.

33 See LOF, Article 50.

34 See LOF, Article 54.

35 Law No.03/L –182 on Protection against Domestic Violence published in Official Gazette No. 76 of 10 August 2010. For more on this law see Gashi, H.; Berisha; Ruzhdi, *Commentary of the Law on Protection against Domestic Violence*, Agency for Gender Equality, Pristina, 2014.

36 Decision of the Basic Court of Peja (Branch in Deçan), No. C. no.220/11 of date 20 May 2013.

not contribute financially to the joint property, she took care of the children, housework and maintenance of the joint properties. Although the immovable property was bought during the marriage it was registered in the name of the husband, and the husband claimed it as his property. The court constituted that such a property is a joint property with equal shares. Thus, after the divorce the court decided to separate all properties into equal shares ($\frac{1}{2}$). However, there are many court cases that faced difficulties in determining the contributions and value of the joint property because of mixed properties (separate property and joint contribution).³⁷ As a result of this, the most recent amendments within the LOF determine equal shares in the joint property for both spouses.³⁸ This approach has also been followed by Book 4 of the KDCC.³⁹

2.3. MAINTENANCE BETWEEN SPOUSES

The property of the spouses can be affected by the obligation of maintenance to the spouse. The spouses take care of each other because this is performed with the function of joint care for the family. However, in the event of separation, the spouse who does not have sufficient means of subsistence has the right to claim alimony from the other spouse who is obliged to provide this maintenance; the conditions are provided by law.⁴⁰ The court determines the possibility and conditions of alimony based on the law conditions among which the lack of means of food or conditions for normal life are the bases of determination.⁴¹ The spouse who does not have sufficient means is not obliged to give this support. But all cases are considered by the court separately and a uniform decision does not exist. The alimony is also foreseen for children and spouses. Thus, the marriage is a legal base that legitimizes a spouse's right to acquire alimony under conditions provided by law. Therefore, the law also provides the alimony for spouses during and after marriage (divorce). In all cases, clarification has to be made regarding what is meant by maintenance between spouses and what is meant by the contribution that affects increasing or creating the joint property.

2.4. DETERMINATION AND SEPARATION OF THE SPOUSES' SHARES

The main question and problem that arises during divorce cases is the issue of the separation of joint property of spouses, respectively a calculation of their shares. In principle the law provides equal shares, however in the case of disagreements the court has to evaluate the contribution of each spouse. The law provides the possibility of considering the contribution from

37 For instance, see See Decision of the Basic Court of Ferizaj, No. C.no.679/18 of date 11 February 2017.

38 Law No. 06/L-077 on Amending and Supplementing the Family Law of Kosovo No. 2004/32. See Article 1 which has amending Article 47 (4) that provides "Spouses are joint owners in equal shares of the joint property unless otherwise agreed on."

39 See below the treatment under KDCC.

40 For more regarding alimony between spouses see LOF, Article 297–299. For further on this see *Aliu, op. cit.*, note 16, pp. 619–625.

41 For instance, see the Basic Court of Prizren No. C.no. 679/15 of date 08 December 2015. In this case the court determined whether what was a contribution for maintenance between spouses during and after marriage and determination/evaluation and the separation of the joint property after divorce.

childcare, housework, etc.⁴² But in many court cases, a women's contribution from housework was not taken properly into account as much as financial contribution that had an impact on increasing joint property.⁴³

The law provides specific rules for the separation of joint property of spouses.⁴⁴ The separation can be requested during marriage and after marriage in the case of divorce. The law doesn't provide any time limit for such a separation, meaning that it can be subject to separation at any time.⁴⁵ It is a rule that spouses may divide their joint property by way of an agreement. In this case the agreement has to be a written form and in the case of immovable property as a notarised act. However, the law specifies that in the case of disputes over the division of joint property, the court will decide. In dividing the shares of the joint property, the court will evaluate the contribution of each spouse. In this case, as mentioned above for the evaluation of the contribution, the court will take into consideration the contribution of the spouse regarding childcare, housework and the work for maintenance and administration of the joint property including any support given to the other spouse.⁴⁶

Movable property may remain property of the spouse who possessed it in the last 3 years, but for this the other spouse is compensated with other items. Also, the items with which the profession or craft was practiced may remain with the spouse who has practiced the profession, but the equivalent property will be given to the other spouse. It should be added that for the cases in which the items cannot be physically divided, they can be sold and the income will be shared. But for an item that cannot be physically separated, one spouse may keep it and the other spouse has to be compensated with money or other items. The law also specifies the right of pre-emption of the spouse in the divided part of the other spouse. The court also decides on the right to live in the joint apartment or house and divides it taking into account all the circumstances, including the welfare and best interest of the children if there are children, for example who will live with the children and also the social position of the spouse.⁴⁷

3. THE MARRIAGE PROPERTY REGIME UNDER KDCC

The KDCC has a regulated property regime for spouses in marriage but also in cohabitation in a different manner compared to that of the LOF. This difference presents itself in two as-

42 See LOF, Article 54 (1): "When the agreement is not reached while the share of each spouse belongs to the joint property, it shall be decided upon by the court. The decision shall be based on the spouses contribution, by evaluating all circumstances and considering not only personal income and other revenues of each spouse, but assistance of one spouse provided to the other spouse, i.e. children's care, conduct of housework, care and maintenance of property and any other form of work and co-operation pertaining to the administration, maintenance and increase of joint property."

43 See for instance the cases of the courts: Decision of the Basic Court in Ferizaj No. C.nr.679/18 of date 11 February 2020; Decision of the Basic Court of Prizren No. C.nr.679/15 of date 8 December 2018; Decision of the Basic Court of Peja (Branch in Decan) No. C. nr. 250/11 of date 20 May 2013; Decision of the Court of the Appeal No. 4913/2015 of date 26 February 2020; Decision of the Court of Appeal No. 2203/2015 of date 26 February 2020.

44 See LOF, Article 52–54, 89 and 90.

45 See LOF, Article 53 (1) and 89.

46 See LOF, Article 54.

47 See LOF, Article 95.

pects: (i) the marital joint property regime and (ii) the contractual property regime. Nevertheless, the spouses may also have separate property.⁴⁸ This development made by the KDCC is in line with developed civil law countries. From a comparative law perspective, it could generally be said that the spouses are free to regulate by contract their property regime (i.e., German law, Austrian Law, French law and Italian law).⁴⁹ In the case that spouses do not choose to regulate the property regime by cataract, the joint property regime applies.

3.1. SEPARATE PROPERTY

The KDCC has followed the same concept of separate property of the spouses as in the LOF.⁵⁰ Thus, the special property of the spouses is considered either as that acquired before the marriage, or the property created during the marriage but that is acquired by inheritance, donation or another form determined by law.⁵¹ It is worth mentioning that contrary to the LOF, the KDCC has clarified that special property invested in the increase of joint property remains a special property. Further, the value of a special property remains unchanged regardless of the addition or reduction of the joint property for which the special property of one or both spouses is engaged.⁵²

3.2. JOINT PROPERTY REGIME

The joint property of the spouses in marriage is the property which is acquired during the marriage and with the joint work or separate work of the spouses. In this respect, the concept of joint property does not change in relation to the LOF in terms of the manner of establishment. But the substantial difference is that joint property is considered in equal parts for each spouse.⁵³ Therefore, according to this regime, in case of division of joint property, the court will decide to divide the property in an equal share (1/2) and there will be no evaluation of the different contributions as it was with the law in force. Thus, according to this concept, all property acquired during the time of marriage *ex lege* is considered equal, unless the spouses have entered into a contract by which they have agreed otherwise on the marital property regime.⁵⁴

This approach came as a result of a lack of the proper evaluation of the women's contribution in cases of the separation of the joint property. Thus, this approach will be a better mechanism for the courts in cases of the separation of the joint property as a result that it

48 See KDCC, Articles 1170–1174.

49 See German Civil Code, Article 1408 *et seq*; Austrian Civil Code, Article, 1217; French Civil Code 1387; Italian Civil Code, Article, 1322; Swiss Civil Code, Article 182.

50 See above point 3.1.

51 See KDCC, Article 1171.

52 KDCC, Article 1171 (3).

53 See KDCC, Article 1170 (3 and 4) in connection with Article 1172 (4).

54 See KDCC, Article 1170 in connection with Article 1172.

will be separated in equal shares and there will be no need for evaluation of their contribution. Many organisations advocated in favour of this solution in order to protect women's property rights.⁵⁵ However, there has been a lot of criticism that this solution allows acquisition of the property by a person/spouse who never contributed to the family duties including the acquisition and protection of the property. In order to find a balancing interest, the concept of a marriage contract is introduced that allows spouses to determine their property regime by a contract. Otherwise, if the spouses do not provide a marriage contract, the property acquired during marriage will be considered as joint property in equal shares.

3.3. THE CONTRACTUAL PROPERTY REGIME

As already mentioned, the KDCC has introduced an innovative solution with regard to the property regime of the spouses, which recognises the pre-marital and marital contract for the property acquired during the marriage: "*Matrimonial spouses at any time during their joint matrimonial life may with a special contract regulate property issues and decide on their property regime and administration*".⁵⁶ This contract⁵⁷ can be concluded before or during the marriage.⁵⁸ This factor depends on the desire of the spouses. Nevertheless, the fact of whether such a contract is concluded before or during the marriage creates different legal effects in the enforcement of the contract. If the contract is concluded before the marriage (known as a pre-marital contract), it will come into force on the day of the marriage registration, whereas the contract concluded by the spouses during the marriage enters into force at the moment of its notarisation.⁵⁹

The future spouses or the spouses through the contract determine their property regime pursuant to the modalities provided by the KDCC for the property regime. In addition, the spouses are forbidden to determine any modality that is against the solutions provided by KDCC.⁶⁰ Furthermore, Article 1183 (5) determines that "A person, who is legally incapable, cannot enter into a marital agreement." This provision is not referenced in Book 4 on Family of the KDCC because the pre-marital and marital contract is a subject of the general rules of the formation of a contract outlined in Book 2 on Obligations. According to this book, a person has to have the capacity to act (in Albanian: *zotësia për të vepruar*) in order to conclude the contract.⁶¹ Here it must be mentioned that within the Book 4 on Family there is not any rule

55 See for instance, Polis, *Të drejtat e grave në pronë: Legjislacioni vs. Zbatimi në praktikë*, Polis, Prishtinë 2017, pp. 4–21. Accessible at: <https://abgj.rksgov.net/assets/cms/uploads/files/Publikimet%20ABGJ/1.%20Raport%20hulumtues%20-%20Final.pdf>; Rrjeti i Grave të Kosovës, *Aanaliza Gjinore e Kosovës*, Rrjeti i Grave të Kosovës, Prishtinë, 2018, pp 16–17. Accessible at <https://abgj.rksgov.net/assets/cms/uploads/files/Publikimet%20ABGJ/1.%20Raport%20hulumtues%20-%20Final.pdf>. Accessed on 25 April 2020.

56 KDCC, Article 1170 (4).

57 KDCC, Book 2 on Obligations, Article 91 gives this definition for the contract: "The contract is an agreement between two or more parties which is intended to create, amend or terminate a binding legal relationship between them, or have any other legal effect."

58 KDCC, Article 1183 (1).

59 KDCC, Article 1183 (2).

60 For this see KDCC, Article 1183 (3 and 4).

61 KDCC, Article 171 determines: "In order to conclude a valid contract, contracting parties must have the capacity to act required by law."

provided with regard to the marriage contracts of persons with restricted capacity to contract or incapable of contracting. By contrast, in comparative law such a rule is subject to law and the marriage contract is allowed to be concluded with the approval of the legal representative.⁶² Nevertheless, under the KDCC such a rule has to be understood in connection with the general rules regarding the representation of persons without capacity to act or with limited capacity to act.

Another issue that needs to be treated is whether there is any limitation for the conclusion of the premarital or marital contract. The KDCC provides only one rule determining that such a contract cannot be contrary to the legal provisions and should respect the applicable laws of the country where the marriage takes place.⁶³ With this solution the approach is followed that when the conditions for the marriage are met, the contract can also be concluded. One exclusion by KDCC Article 1185 is foreseen, which requires that the pre-marital and marital contract has to be concluded in notarial form.⁶⁴ The notarial form of the contract is regulated by the Law on Notary (hereafter: LON).⁶⁵ Pursuant to the LON such a contract has to be concluded in the form of formalization of the document of the parties (in Albanian: *solemnizimi*).⁶⁶

4. CONCLUSION

Marriage has a direct impact on the property issues of the spouses. Under Kosovo law the concept of same sex marriage is well established, which has the most traditional civil law countries as models. The same approach is followed by the KDCC which provides regulation on the existence of marriage between a man and women. Nevertheless, since the civil law codification is in the process of being established, it is the decision of Parliament to decide whether other forms of cohabitation or marriage would be included as a consequence of different voices calling on equality and a human rights perspective, or whether it will be difficult to regulate this by special law as has been pointed out by the current draft of the KDCC.

With regard to the property regime of spouses, a difference between the current LOF and the forthcoming KDCC is specified. The LOF recognises the size of the contribution with regard to the separation of the joint property of the spouses. Contrary to this, the KDCC does not recognise the size of the contribution but rather considers the property in equal parts for both spouses. Furthermore, the LOF does not recognise the marriage contract of the spouses in contrast to the KDCC which has created a legal base for the contractual regulation of the property regime of the spouses. Consequently, the spouses have autonomy when it comes to the regulation of such property regimes provided by the LOF. This means that there is no

62 See for instance BGB, Article 1411.

63 See KDCC, Article 1183 (4).

64 This regulation is recognised also in comparative law. For instance, Article 1410 of BGB determines: "The marriage contract must be recorded by a notary, and both parties must be present."

65 Law No. 06/L-010 on Notary published in Official Gazette No. 23 of 26 December 2018. For more on validity and invalidity of the notarial acts see Pretenti, B., *Aktet Noteriale dhe Pavlefshmwria e tyre*, Revista "Juridica", Kolegji Evropian "Juridica", Nu. 2/2012-3/2013, pp. 94–106.

66 LON, Article 41.

legal restriction provided by applicable legislation that limit such a freedom of spouses to determine the property regime pursuant to the solutions provided by the LOF. The rules on the contract are subject to contract law rules from Book 2 of the KDCC. Further, it has to be mentioned that all other rules for the formation, legality and nullity of the contract provided by Book 2 finds application with regard to the pre-marital and marital contract. Furthermore, for the conclusion of such a contract the rules provided by the Law on Notary have to be followed with regard to the form of the contract and the presence of the notary in the conclusion of such a contract.

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BRAK I IMOVINSKI REŽIM IZMEĐU BRAČNIH DRUGOVA PREMA AKTUALNOM ZAKONU I PREMA NACRTU GRAĐANSKOG ZAKONIKA KOSOVA

Sažetak

Utjecaj braka na imovinska prava bračnih drugova priznaje se još od Rimskog prava i dan danas ostaje princip koji je priznat u svakom europskom pravnom sustavu. Prema zakonu Kosova, brak stvara različite posljedice između bračnih drugova, uključujući i imovinska prava. U skladu sa Zakonom o obitelji, sadašnji imovinski režim bračnih drugova postavlja pravila o vlastitoj imovini i bračnoj stečevini. Međutim, ne priznaje ugovor o reguliranju načina imovinskog stanja bračnih drugova. To je stvorilo problem u vezi s podjelom imovine nakon prestanka braka. Suprotno tome, prema nacrtu Građanskog zakonika Kosova – Knjiga 4 o obitelji, imovinski režim bračnih drugova je napredovao, uključujući i priznanja predbračnog i bračnog ugovora. U ovom radu raspravlja se o pitanjima koja potječu iz odnosa između bračnih drugova. Riječ je o odnosima koji imaju utjecaj na trenutnu zakonsku perspektivu i u skladu su s kodifikacijom civilnog zakonodavstva koje se događa na Kosovu.

Ključne riječi: *kosovsko pravo, Građanski zakonik, brak, bračni drugovi, imovinsko stanje, ugovor*



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